IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 223 OF 2019

BETWEEN

ONESMUS SINTOLE SAIDIMU.....APPELLANT

AND

SANE OLE SAIDIMU NKIKOORA.....1ST RESPONDENT

SEMENKURR SANE SAIDIMU.....2ND RESPONDENT

THE STATUTORY MANAGER, UNITED INSURANCE

CO. LTD *(under statutory management)*.....**3RD RESPONDENT**

LAND REGISTRAR KAJIADO

LAND REGISTRY.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

GEORGE NGURE KARIUKI.....6TH RESPONDENT

*(Being an appeal from the entire Ruling and Order of the High Court of Kenya at Kajiado (**Hon. C. Ochieng', J**) delivered on 27th February 2019*

in

Kajiado ELC Case No. 332 & 943 of 2017)

****

JUDGMENT OF THE COURT

[**1**] On 27th February, 2019, the learned Judge of the Environment and Land Court (ELC) at Kajiado (**C. Ochieng', J**) delivered a ruling in two applications. The first application dated 25th January, 2016 was filed in Nairobi ELC No. 1209 of 2015. In that application, it was sought to have the name of Nkikoora the plaintiff in the suit substituted with that of **Semenkurr Sane Saidimu** (Semenkurr). In the supporting affidavit sworn by Nkikoora's advocate, it was deponed that Nkikoora died sometime in August 2015 and that the suit which was filed in June 2016 was wrongly filed in his name after his death, hence the application to have Semenkurr substituted as the plaintiff.

[**2**] The second application dated 17th April, 2018 was filed in Kajiado ELC No. 332 of 2017 by Semenkurr seeking to be enjoined in that suit as an interested party and also to have the consent entered on 31st July, 2017 set aside. The grounds upon which the application was based are that Semenkurr is the personal representative of the estate of Nkikoora by virtue of letters of administration *ad litem* issued to him on the 16th of April 2018; that the consent recorded in ELC No. 332 of 2017 for the transfer of the suit property to **Onesmus Sintole Saidimu (Onesmus**) was prejudicial to the estate of Nkikoora as Nkikoora was the owner of the suit property, and that the consent was recorded without Nkikoora's knowledge despite the parties in the suit being aware of his interest.

[**3**] The Statutory Manager - United Insurance Company (under statutory management) (the Statutory Manager), the Insurance Regulatory Authority, the Lands Registrar - Kajiado and the Attorney General, were respondents in both applications. In addition, **George Ngure Kariuki** (**George**) was a respondent in Nairobi ELC No. 1209 of 2015 while Onesmus was a respondent in Kajiado ELC No. 332 of 2017.

[**4**] In his ruling, the learned Judge found that Kajiado ELC No. 943 of 2017 which had been filed in the name of Nkikoora was incompetent as Nkikoora had died before the suit was filed. Consequently, the learned Judge declined to have Semenkurr substituted in place of Nkikoora and rejected the chamber summons dated 25th January 2016.

[**5**] The learned Judge allowed the notice of motion dated 17th April 2018, and granted orders to have Semenkurr enjoined as an interested party in Kajiado ELC No. 332 of 2017. This was because Semenkurr was the legal representative of the estate of Nkikoora, who claimed ownership of the suit property. The learned Judge also directed that the consent judgment that had been entered on 21st July 2017 in Kajiado ELC No. 332 of 2017, be stayed and/or set aside as the court was not informed of the existence of Kajiado ELC No. 943 of 2017, in which Nkikoora claimed ownership of the suit property. The learned Judge directed that Kajiado ELC No. 332 of 2017 be set down for hearing and determination on merit.

[**6**] Being aggrieved by the judgment, Onesmus has filed an appeal in this Court. In his memorandum of appeal, he contends that Kajiado ELC No. 943 of 2019 was incompetent and fatally defective. He faults the learned Judge: in failing to strike out Kajiado ELC No. 943 of 2019; in enjoining Semenkurr as a party in Kajiado ELC No. 332 of 2017 when the suit had already been determined; in setting aside the consent judgment in Kajiado ELC No. 332 of 2017; in framing issues which were not pleaded by the parties; and in conducting the proceedings in a disjointed and fatally defective manner.

[**7**] Hearing of the appeal proceeded through written submissions that were duly filed by the parties and which the parties' advocates were given opportunity to orally highlight through virtual hearing on the GoToMeeting digital platform.

[**8**] For Onesmus, it was submitted that the learned Judge having declined to substitute Semenkurr in place of Nkikoora in Kajiado ELC 943 of 2019, and having ruled that, that suit was incompetent, it was contradictory for the learned Judge to take Kajiado ELC 943 of 2017 into consideration, in determining the propriety of the consent judgment in Kajiado ELC No. 332 of 2017, when the former suit was a nullity and did not exist. Onesmus relied on **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 others** [2014] eKLR.

[**9**] Onesmus faulted the learned Judge for proceeding in an irregular manner, by considering Kajiado ELC No. 332 of 2017 and Kajiado ELC No. 943 of 2017 as if the two suits were consolidated. This made it difficult for the court and the parties differentiate the two suits to determine the issues in dispute in the two applications and in particular, it was not clear in which suit Semenkurr should be enjoined.

[**10**] Onesmus challenged the order setting aside the consent judgment and requiring the suit to be heard, maintaining that the suit had already been withdrawn against three of the defendants. These defendants could no longer participate in the suit. In addition, the order as extracted did not join Semenkurr as a party in the suit, and he could not therefore take any steps to defend or prosecute the suit. **Lilian Wairimu Ngatho & Anor v Moki Savings Cooperative Society Limited & Anor [2014] eKLR** was cited in support of the submissions and the Court urged to allow the appeal.

[**11**] The 1st and 2nd respondents opposed the appeal. In their submissions, they identified 4 issues for determination.

(i) Whether having ruled that Kajiado ELC 943 of 2019 was incompetent and fatally defective, the learned Judge erred in her failure to strike it out;

(ii) whether the learned Judge erred in setting aside a consent judgment without proof of any of the factors for setting aside a consent judgment;

(iii) whether the learned judge erred by enjoining the 2nd respondent in Kajiado ELC 332 of 2017 after it had been determined;

(iv) whether the learned Judge erred in conducting proceedings in a disjointed and fatally defective manner.

[**12**] It was submitted that the court having ruled that Kajiado ELC 943 of 2017 was fatally defective, Semenkurr was enjoined in Kajiado ELC No. 332 of 2017 as an interested party to pursue his interest in ELC No. 332 of 2017, and the failure by the court to strike out Kajiado ELC No. 932 of 2017 does not in way prejudice Onesmus as that suit was no longer in existence.

[**13**] In regard to the setting aside of the consent, the Court was referred to **Flora N. Wasike v Destimo Wamboko [1988] eKLR** for the proposition that the Court has inherent powers to set aside a consent. The Court was referred to the principles for setting aside consent orders as laid in **Brook Bond Liebig (T)) Ltd v Mallya [1975] EA**, and informed that those principles included setting aside a consent on grounds of fraud, collusion or misrepresentation and concealment of material facts. It was submitted that although an advocate has general authority to compromise a suit on behalf of a client, that authority must be exercised in a *bona fide* manner. That the counsel on record in Kajiado ELC No. 332 of 2017 were the same counsel on record in Kajiado ELC No. 943 of 2017, but still failed to disclose the existence of Kajiado ELC No. 943 of 2017, well knowing that the subject matter of that suit was similar in nature and substratum to that in Kajiado ELC No. 332 of 2017.

[**14**] It was argued that Semenkurr being the legal administrator of the estate of Nkikoora by virtue of grant of letters of administration *ad litem*, he was entitled to be heard by a court of law in a matter concerning the estate, before orders affecting the estate are made. Reliance was placed on **ELC No. 148 of 2014, Abdizirak Abdullahi Alin vs Simon Choper & anor**, wherein the court noted the importance of hearing a person who was likely to be adversely affected by a decision, before the decision is made, and that when a decision is made without the participation of such a party, the rules of natural justice are violated. The Court was urged that the consent entered into by the parties in

Kajiado ELC No. 332 of 2017, did not meet the legal requirements, as it was entered into fraudulently and without following the due procedure provided in law.

[**15**] It was argued that the learned Judge did not err in enjoining Semenkurr in Kajiado ELC No. 332 of 2017, as he is the administrator of Nkikoora, who was formerly the registered proprietor of the suit property, which he contended was fraudulently and illegally acquired by Onesmus. It was submitted that Semenkurr has an identifiable stake, legal interest and duty in the proceedings in Kajiado ELC No. 332 of 2017. Further, any party can invoke the inherent jurisdiction of the court in the interest of justice, to be joined as an interested party. Finally, the Court was urged to find that given the correlation between the two suits and the possibility that the ruling in either of the applications would affect the proceedings in the other suit, and the fact that the delivery of a single ruling in both applications was not prejudicial as the court addressed each application individually, the procedure adopted by the learned Judge was proper.

[**16**] The Statutory Manager who was the 3rd respondent supported the appeal and associated himself with the submissions that were made by Onesmus. He submitted that the learned Judge having confirmed that Kajiado ELC No. 943 of 2017 was a nullity, that suit could not have any effect on the proceedings in Kajiado ELC No. 332 of 2017, and the contention that counsel for Onesmus and the statutory manager, concealed material facts was erroneous in law.

[**17**] The Statutory Manager noted that Kajiado ELC No. 332 of 2017 was compromised, and therefore, there were no longer any proceedings to which Semenkurr could be enjoined under Order 1, Rule 10(2) of the Civil Procedure Rules. Relying on **J.M. K. v M. W. M & Anor [2015] eKLR,** it was submitted that Order 1 Rule 10(2) contemplates an application for joinder of parties where proceedings are still pending before the court, and not where the proceedings have already been finalized. It was argued that Nkikoora and Semenkurr were not parties to the proceedings in Kajiado ELC 332 of 2017, nor were they claiming under any of the parties thereto, and they therefore have no *locus standi* to seek the setting aside of the consent judgment.

[**18**] The Statutory Manager argued that the learned Judge did not consider that a consent can only be set aside on grounds that will justify setting aside of a contract. Finally, it was submitted that no order for consolidation of proceedings had been made and the apparent consolidation of the two applications reflected a confusion in the way the two suits were dealt with and determined. The Court was therefore urged to allow the appeal.

[**19**] No submissions were filed by the Land Registrar Kajiado, the Hon. Attorney General, and George Ngure Kariuki who were 4th, 5th and 6th respondents respectively.

[**20**] We have considered this appeal and carefully perused the record of appeal, the submissions made before us, and the authorities cited. Two main issues of law arise, that is the issue of joinder and the issue of setting aside a consent judgment. In particular, whether the learned Judge erred in joining Semenkurr as an interested party in Kajiado ELC No. 332 of 2017, when that suit had already been compromised, and whether the circumstances obtaining justified the setting aside of the consent judgment in Kajiado ELC No. 332 of 2017. In order to address these issues, it is critical to understand the facts leading to the two applications that were before the court. For this reason, we have carefully perused the record of appeal.

[**21**] We note that there are several suits referred to therein that we need to put in proper perspective. The first suit is Machakos ELC No. 128 of 2014 in which Onesmus was the plaintiff. He had sued the Statutory Manager, the Insurance Regulatory Authority, the Lands Registrar, Kajiado and the Attorney General as defendants. The substantive order sought in the suit is an order for specific performance directing the Statutory Manager and the Land Registrar to transfer property known as Kajiado/Purke/334 to him. This is the property referred to herein as the suit property.

[**22**] Nairobi ELC No. 1209 of 2015 is another suit that features prominently. It was filed by Nkikoora, through a plaint that was dated 23rd June, 2015. The defendants in this suit are George, the Statutory Manager, Onesmus, together with the Land Registrar Kajiado and the Hon. Attorney General. Nkikoora sought a declaration that he is the rightful owner of a property identified as Kajiado/Purke/334. Once again, this is the suit property. Nkikoora claimed that George had fraudulently obtained the title to the suit property from him, and that Onesmus, a stranger to him, was claiming that the suit property was sold to him by George. Nkikoora therefore sought a declaration that he is the rightful owner of the suit property and a permanent injunction restraining the defendants from interfering with, trespassing on or evicting him from the suit property. Onesmus filed a defence and counterclaim in ELC No. 1209 of 2015, denying the allegations of fraud made by Nkikoora, and claiming to be the beneficial owner of the suit property, having purchased it from the Statutory Manager following a successful bid.

[**23**] The subject matter of the two suits, Machakos ELC No. 128 of 2014 and Nairobi ELC No. 1209 of 2015 is the same, that is, the ownership of the suit property. The relationship between Nairobi ELC No. 1209 of 2015 and Kajiado ELC No. 943 of 2017 is not clear from the record of appeal or the ruling of the learned Judge. However, Onesmus in his submissions has stated that Nairobi ELC No. 1209 of 2015 was transferred to Kajiado and allocated another number, that is, Kajiado ELC No. 943 of 2017. We find that there is substance in this contention because, although the application before the learned Judge was filed in Nairobi ELC No. 1209 of 2015, the learned Judge did not make any reference to that number, but instead referred to Kajiado ELC No. 943 of 2017. It would have been appropriate for purposes of clarity for the learned Judge to indicate the connection between the two numbers, but this failure did not cause any prejudice.

[**24**] From the pleadings in Nairobi ELC No. 1209 of 2015, Nkikoora was claiming the suit property, and his claim was amongst others against the statutory manager, Onesmus and George. This suit was fatally defective, having been filed in the name of Nkikoora after his death. The learned Judge cannot therefore be faulted for rejecting the application to have Semenkurr substituted in place of Nkikoora, as there was no valid suit. In our view, an order for striking out the suit was superfluous and needless. That suit was in law a nullity, and as stated in **Macfoy vs United Africa Company [1961] 3 All ER 1169:**

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to***

be so."

[**25**] As regards Kajiado ELC No. 332 of 2017, there is no plaint, nor are there any other pleadings filed under this number, apart from the notice to withdraw the suit and the consent filed by the parties' advocates. Once again, we would agree with the submissions made by Onesmus, that this suit, that is, Kajiado ELC No. 332 of 2017, is what was originally Machakos ELC No. 128 of 2014, that was subsequently transferred to Kajiado as Kajiado ELC No. 332 of 2017. With the withdrawal of the suit against the Insurance Regulatory Authority, Kajiado Land Registrar and the Hon. Attorney General, the claim only remained against the statutory manager, who conceded to Onesmus's claim through the consent that was recorded by the parties' advocates.

[**26**] On the issue of joinder, Order 1 rule 10(2) of the Civil Procedure Rules gives the court discretion to enjoin a party at any stage of the proceedings, provided the party's presence is necessary to enable the court completely adjudicate upon all the issues before it. We agree with the test provided in **Amon vs Raphael Tuck & Sons Limited [1956] 1 ALL ER 273** applied by **Mativo, J**. in **Kenya Medical Laboratories Technicians and Technologists Board & 5 others vs Attorney General & 4 Others [2017] eKLR**, that:

> ***"The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner, or whether the joinder would involve an investigation into a question not arising on the course of action averred by the petitioner. It is whether the intended interested party has an identifiable stake or a legal interest or duty in the proceedings."***

[**27**] This is consistent with the definition in Black's Law Dictionary of an interested party as a person who has a recognizable stake in a suit and a necessary party, as a party who being closely connected to a law suit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings. See also **Board of Trustees Kenya Entrepreneurship Empowerment Foundation vs WC4 & Anor [2016] KLR**.

[**28**] As already stated, Order 1 rule 10(2) of the Civil Procedure Rules allows a party to be enjoined in a suit at any stage of the 'proceedings'. Unfortunately, neither the Civil Procedure Act nor the Civil Procedure Rules defines 'proceedings'. We have therefore resorted to the definition in Black's Law Dictionary, 10th edition in which the following quote by **Edwin E. Bryant** in **The Law of Pleadings Under the Codes of Civil Procedure 3-4 (2nd ed. 1899)** is adopted.

> **"Proceeding is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court express or implied. It is more comprehensive than the word 'action' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include – (1) The institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to the execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate court or reviewing court; (13) the enforcement of the judgment or a new trial as may be directed by the court of last resort."**

[**29**] In our understanding of the above, 'proceeding' does not end with the judgment in a suit. It includes other processes that may arise after the judgment, as long as the court has jurisdiction to entertain them. By his application dated 17th April, 2018 Semenkurr sought to be joined as an interested party in Kajiado ELC No. 332 of 2017, precisely to challenge the consent judgment which he contended was irregularly entered. The learned Judge had jurisdiction to consider the propriety of the consent judgment and he could not do so without joining Semenkurr in the suit. It cannot therefore be said that the court was *functus officio* such that it could not entertain the application to join Semenkurr in the suit.

[**30**] Evidence was adduced to show that Semenkurr was a representative of the estate of Nkikoora pursuant to grant of letters of administration *ad litem* issued to him, and in this capacity wished to protect the estate's interests by being enjoined in the suit. Although Onesmus maintained that the suit had been finalized, Semenkurr sought to have the consent set aside. The learned Judge cannot be faulted for taking into account the similarities in the two suits and the fact that it was not only the parties who were similar, but even the subject matter of the suits. It was therefore in the interest of justice that Semenkurr be joined in the suit so that he is given an opportunity to protect the interests of Nkikoora's estate.

[**31**] In **Flora Wasike v Destino Wamboko [1988] eKLR, *Hancox JA*** in holding that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, adopted the following passage from **Purcell v FC Trigell Limited [1970] 2 All ER 671**-

> ***"… if a consent order is to be set aside it can really only be set aside on grounds that will justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons."***

[**32**] The question is whether there was a ground that would justify the setting aside of the consent judgment. The learned Judge found that there was concealment of material fact intended to defeat the ends of justice, at the time the consent was recorded, as the parties were aware of Nkikoora's claim over the suit property, even as they consented to have the property transferred to Onesmus. It is clear that the suit property was the subject of the claim in Nairobi ELC No.1209 of 2015 in which Onesmus and the Statutory Manager who entered into the consent were defendants. We cannot therefore fault the learned Judge as the circumstances in which the consent was recorded in Kajiado ELC No. 332 of 2017 showed lack of candour and an intention to pull the rug from under Nkikoora's feet. In our view, there was material non-disclosure and a lack of good faith in recording the consent, and this justified the setting aside of the consent.

[**33**] We note that although the learned Judge found that Semenkurr met the criteria for being enjoined in the suit as a necessary party 'to

enable the court effectually and completely adjudicate upon this suit' the learned Judge did not, in her final orders specifically make an order for Semenkurr to be joined in the suit. The setting aside of the consent judgment gave a new life to Kajiado ELC No. 332 of 2017 and paved way for Semenkurr to file appropriate documents, so as to enable the court to resolve the dispute in Kajiado ELC No. 332 of 2017. The joining of Semenkurr to the suit was a logical consequence of the conclusions made by the learned Judge. The failure to make a specific order for Semenkurr to be joined in the suit was an inadvertent omission which we find it necessary to correct.

[**34**] The withdrawal of Kajiado ELC No. 332 of 2017 against three of the defendants did not affect the subject matter of the suit, as none of these defendants claimed ownership of the suit property. In any case, both Onesmus and the Statutory Manager would be at liberty to call any of the defendants against whom the suit was withdrawn, as witnesses.

[**35**] As regards the consolidation of the two applications, it is apparent from the record that there was no formal application for consolidation, but the two applications were heard together through written submissions following directions that were given by the court on 20th February, 2018. None of the parties objected to the directions that were given. Instead, they complied and filed written submissions. They cannot now be heard to complain. In any case, the two applications were so closely intertwined, that it was appropriate that they be heard together. The disjointed procedure is curable under **Article 159(2)(d)** of the Constitution.

[**36**] The upshot of the above is that we find no merit in this appeal. Accordingly, we uphold the ruling of the lower court and dismiss the appeal. For the avoidance of doubt, we order that Semenkurr shall be joined in Kajiado ELC No. 332 of 2017 as an interested party in his capacity as the legal representative of the estate of Nkikoora. We award Semenkurr the costs of the appeal.

Dated and delivered at Nairobi this 29th day of January, 2021.

R. N. NAMBUYE

……..

JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR